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In The
Supreme Court of the United States
October Term, 1990

JANE BRAY, *et. al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et. al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF AMICUS CURIAE OF GEORGE LUCAS, THE NATIONAL BLACK COALITION FOR TRADITIONAL VALUES, AND OTHER BLACK LEADERS AND ORGANIZATIONS IN SUPPORT OF PETITIONERS

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Note: This Amici Brief is being filed with the consent of all of the parties. Consents are on file with the Office of the Clerk.

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INTEREST OF THE AMICI

The amici are certain black pastors and organizations who are concerned that federal civil rights statutes, which were enacted principally to protect all Americans against racial bias, will lose their still-needed focus on racial animosity.

The amici are also concerned about the attempt of certain elements in society to use abortion as a genocidal tool for getting rid of America's socially despised poor.

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Pro-Life Pro-Family Coalition
Chicago, Illinois

Dr. Dolores Bernadette Grier and the
Voters Against Abortion
New York, New York

Pastor Joe Dallas and the
Blacks for Life
Milwaukee, Wisconsin

Rev. Cleveland Sparrow and the
Sparrow World Baptist Church
Washington, D.C.

Barbara Bell and the
Massachusetts Blacks for Life
Medford, Massachusetts

Rev. St. George Cross and the
Society for the Advancement of Families Everywhere
Randalls Town, Maryland

Pastor Greg Keith and the
Black Alliance for the Family
New Brighton, Minnesota

SUMMARY OF ARGUMENTS

The focus of the Ku Klux Klan Act on protecting racial minorities against discrimination should not become blurred through the adoption of different standards or tests for determining how a protected class should be defined.

The Ku Klux Klan Act, which was designed to protect us against racial animosity, should not be turned inside out to become a tool of those who wish to rid society of its unwanted black population.

There is no fundamental right to kill a human offspring, prenatally or otherwise. Thus there is no right in this case protected by the Equal Protection provisions of the Ku Klux Klan Act or of the Fourteenth Amendment. Thus, there is no federal jurisdiction to hear this case.

The reason there is no such fundamental right is that this Court's holding in *Roe v. Wade* was in error. In *Roe v. Wade*, this Court resurrected its analysis found in its infamous *Dred Scott* decision by declaring that prenatal human offspring, like *Dred Scott* before them, are not persons under the eyes of the law. Black babies have borne the brunt of this dehumanizing analysis, and this will become even more the case as time goes on. *Roe v. Wade*, and the analysis of *Dred Scott* with it, must be overruled.

ARGUMENTS

I. THE TESTS FOR DEFINING A CLASS WITHIN THE MEANING OF THE CIVIL RIGHTS STATUTES SHOULD NOT BE TAMPERED WITH OR ALTERED.

Traditionally, it has been possible to show that one falls within the protective scope of federal civil rights laws simply

by showing that one is black. This protected us against both obvious and subtle acts of racial hatred. This is what Congress intended. But if the definition of a class within the meaning of these statutes is changed, the focus of these statutes on racial harassment can become blurred, the full measure of the law's protection against racial discrimination diluted.

If blacks who find that they are the victims of subtle forms of discrimination must begin meeting new standards for defining a class, the fact that they are black might no longer suffice for them to claim their right to protection under the civil rights laws.

We have no objection to sharing with other classes of persons the enjoyment of other federal laws for the protection of civil rights. We only ask for the full enjoyment of our own civil rights laws. Congress is fully competent to pass other civil rights laws which can embrace other classes of persons and use other standards and tests for determining the existence of a suspect class.

We share the hopes and aspirations of all those who strive for equality. We simply don't want the hard-fought gains of the past, paid for in full measure in blood, to be eroded now under the dangerous myth that strong measures for the protection of racial minorities are no longer needed.

II. ABORTION IS A TOOL OF RACIAL GENOCIDE.

Talk about class animus! If ever there was class animus it has been the attempt by certain elements of society to keep blacks in a socially, economically, and politically inferior position in society.

Margaret Sanger, the founder of Planned Parenthood, sought a solution for society's Negro problem. She started a

"Negro project" designed to reduce the black population in America. Black Americans were particularly targeted because to Margaret Sanger, the way to get rid of poverty was to get rid of poor people. She despised poor people as being a drag on society, and said that the desire of black families to have children was based on "...their ignorance, superstitions and doubts." *Letter of Margaret Sanger to C. Gamble,* December 10, 1939.[1] She sadly noted that "large numbers" of blacks "still believe...that God sends them children." *Letter of Margaret Sanger to D. Rose,* March 8, 1941. To her, the next generation of black babies was nearly a disease. In this context she wrote:

"We do not want word to go out that we want to exterminate the Negro population and the minister is the man who can straighten out that idea if it ever occurs to any of their more rebellious members." *Letter of Margaret Sanger to C. Gamble*, December 10, 1939.

One of her associates referred to "the colored minister" as being "an extremely necessary unit in the work." *Letter of Margaret Sanger,* December 2, 1939. Another associate proposed that "minor contributions to local (black) churches" be made in order to win their support. *Letter of C. Gamble to Florence Rose*, November 26, 1939. But noting that blacks might recognize it as a plan for extermination, this same associate wrote,

"Hence let's appear to let the colored run it (the Colored Steering Committee) as we appeared to let the South do the conference in Atlanta." *Id.*

1.) The references herein to the letters of Margaret Sanger are from the Margaret Sanger Papers which are kept on file in the Women's History Archives at Smith College in Northampton, Massachusetts. We wish to thank the African-Americans Against Black Genocide for providing us with a copy of them.

Well, we are black ministers and black leaders, but we are not fooled by those who say they are doing us a favor by aborting our children. Black America is not one of society's problems. Black babies are not some sort of disease that should be wiped out so that society itself will not have to confront the root causes of poverty.

Black babies are black America's future. Black babies are America's future just as much as white babies are.

More black babies have been killed through abortion since *Roe v. Wade* was decided, however, than were freed by the Civil War and the Thirteenth Amendment.

In this case the number one proponent of abortion has now come forward to use the Ku Klux Klan Act to advance its own agenda. It is an abomination to hear of any such group trying to use a law which was designed to protect us against racial harassment in order to carry on a practice which devastates the black community and promotes the genocidal policies of Planned Parenthood's founder, Margaret Sanger.

The program of Planned Parenthood is the Civil Rights Movement in reverse. Dr. King looked at the despair and depression in the black community and wondered how it could be changed by building the black community up from the inside, by providing black Americans with the opportunities they would need to strengthen themselves and their families. His dream was based upon a belief that black America could, despite its lowly status, rise up from where it was and assume its rightful place in society, its full rightful share of opportunity, and its full realization of the American dream.

Margaret Sanger's solution for the Negro problem, however, was based upon the assumption that black America was beyond hope, that you could not build it up from the in-

side, that the best thing you could do for society would be to get rid of black America in the best way she and her fellow conspirators knew how: by eliminating the black people one child at a time, in a socially approved way, and with the help of black pastors. This is nothing more than a socially sanitized lynching.

We appeal to this Court not to be fooled by the rhetoric of white collar rednecks and Holocaust liberals—and those who have sold out to them—who would distort the meaning of a civil rights statute and let it be used as a tool by those who are trying to cleanse society of its Negro problem (read: exterminate us).

III. THERE IS NO FUNDAMENTAL RIGHT AT ISSUE HERE.

There is no fundamental right to kill a human offspring, prenatally or otherwise. Thus there is no right in this case protected by the Equal Protection provisions of the Ku Klux Klan Act or of the Fourteenth Amendment. Thus, there is no federal jurisdiction to hear this case.

The reason there is no such fundamental right is that this Court's holding in *Roe v. Wade* was in error. In *Roe v. Wade*, this Court resurrected its analysis found in its infamous *Dred Scott* decision by declaring that prenatal human offspring, like *Dred Scott* before them, are not persons under the eyes of the law. Black babies have borne the brunt of this dehumanizing analysis, and this will become even more the case as time goes on. *Roe v. Wade*, and the analysis of *Dred Scott* with it, must be overruled.

A. DRED SCOTT and ROE v. WADE Must Be Overruled.

Everyone knows that the Thirteenth and Fourteenth

Amendments overruled the result of *Dred Scott*, but what about the analysis?

How did this Court come to the conclusion that blacks are not persons within the meaning of the law? By using a two-tiered analysis to determine who has rights under the law. Using this analysis, this Court concluded that in order to be a person within the meaning of the law, one not only had to be a person, one also had to be within a particular class of persons who were intended to be recognized as such. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-407 (1857).

What authority did this Court cite for this proposition? None. It did make reference to provisions of the Constitution and other authorities which, either expressly or implicitly, did not recognize the standing of blacks to assert the full scope of their rights. *Dred Scott*, 60 U.S. at 407-427. But as for the proposition itself that blacks are simply not persons per se, *Dred Scott* was clearly wrong. This Court was unable to cite any authority in *Dred Scott* which actually denied the personhood of blacks per se.

Quite the contrary was true. The law of the slave states themselves rejected this notion. In 1820 the Supreme Court of Mississippi was faced with a case in which a man was prosecuted for murdering a slave. His defense was that a slave is not a "person" within the meaning of the homicide laws. The court rejected this reasoning, saying,

> "Has the slave no rights, because he is deprived of his freedom? He is still a human being, and possesses all those rights, of which he is not deprived by the positive provisions of the law, but in vain shall we look for any law passed by the enlightened and philanthropic legislature of this state, giving even to the master, much less to a stranger, power over the life

> of a slave. Such a statute would be worthy the age of Draco or Caligula, and would be condemned by the unanimous voice of the people of this state, where, even cruelty to slaves, much less the taking away of life, meets with universal reprobation." *State v. Jones*, 2 Miss. (1 Walker) 39 (1820).

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> "Is not the slave a reasonable creature, is he not a human being, and the meaning of this phrase reasonable crea ture is a human being, for the killing a lunatic, an idiot, or even a child unborn, is murder, as much as the killing a philosopher, and has not the slave as much reason as a lunatic, an idiot, or an unborn child?" *State v. Jones*, 2 Miss. at 40.

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> "Jews (in Coke's time) were then regarded in a light more odious than the most abject slave, yet to kill them was murder." *Id.*

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> "When the northern barbarians overran Southern Europe,they had no laws but those of conquerors, and conquered, victors, and captives, yet even by this savage people, no distinction was recognized between the killing in cold blood, a slave or a freeman. And shall this court, in the nineteenth century, establish a principle, too sanguinary for the code even of the Goths and Vandals, and extend to the whole community, the right to murder slaves with impunity?" *Id.*

The court cited uncontradicted authorities from Virginia and North Carolina for the proposition that in the eyes of

the law, slaves were persons. *State v. Jones*, 2 Miss. at 39.

Even in *Dred Scott* this Court conceded, with respect to the words of the Declaration of Independence which state that all men are created, that those words,

> "...would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood (to include blacks)." *Dred Scott*, 60 U.S. at 410.

The personhood of blacks within the meaning of the law was reaffirmed by the Supreme Court of Mississippi in 1859, two years after *Dred Scott* was decided. *Minor v. State*, 36 Miss. 630 (1859).

The Thirteenth and Fourteenth Amendments were supposed to overrule *Dred Scott*. No longer was the law to use a two-tiered analysis to recognize who has rights under the law---*i.e.* who a person is. Rather, the analysis was to be a simple, straight forward, one-tiered analysis.

The sponsor of the Fourteenth Amendment in the U.S. House of Representatives, John A. Bingham, said that the amendment was "universal" and that it applied to "any human being." Cong. Globe, 39th Cong. 1st Sess. 1089 (1866). His counterpart in the Senate, Jacob Howard, said the amendment applies to "the humblest, the poorest, the most despised." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). And, as U.S. Senator Allen A. Thurman of Ohio would say a short time later, in 1875, the Equal Protection Clause,

> "...covers every human being within the jurisdiction of a State. It was intended to shield the foreigner, to shield the wayfarer, to shield the Indian, the Chinaman, every human being within the jurisdiction of a State

> from any deprivation of an equal protection of the laws." 3 Cong. Rec. 1794 (1875).

What really happened instead? In *Roe v. Wade* this Court used a two-tiered analysis. This Court said that in order to be a person---one whose rights are recognized in the law, one not only had to show that one is a person, but also that one is within a particular class of persons intended to be recognized as persons. *Roe v. Wade*, 410 U.S. 113, 156-159 (1973).

As in *Dred Scott*, this Court did cite numerous authorities which in fact stand for the proposition that certain human beings---*i.e.* prenatal offspring--- do not have standing in many instances. *Id.* But virtually none of the old common law cases actually addressed the issue of prenatal personhood per se. (The old common law cases which did address the issue of personhood per se, rather than that of standing, found that prenatal human offspring are persons;[2] but apparently this Court in *Roe* was unaware of the existence of these cases.)

2.) *E.g.*, *State v. Cooper*, 22 N.J.L. 52 (1849); *Mills v. Commonwealth*, 13 Pa. 630 (1850); *State v. Murphy*, 27 N.J.L. 112 (1858); *and State v. Winthrop*, 43 Ia. 519 (1876). *See also*, F. Wharton, A Treatise on the Law of Homicide in the United States, 96-97 (1855) (citing *Regina v. West*, *infra*, on the issue of there being no viability requirement, as being authoritative).

For English cases, *see, e.g.*, *Regina v. Sims*, 75 Eng. Rep. 1075 (Queen's Bench 1601); *Rex v. Senior*, 1 Moody CC 346 (1832); *Regina v. Trilloe*, 174 Engl Rep. 674 (1842); *Regina v. West*, 2 C & K 784 (1848) (holding that there is no viability requirement for the protection of prenatal offspring themselves.) For English authorities citing *Regina v. West* with approval, *see*, 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516 (Penrose Am. ed. 6th ed. 1866). *See also*, Coke (3 Inst. 50); Hawkins (1 Hawkins Ch. 13, s. 16); Blackstone (4 Bl. Com. 198); and 1 P. Wms. 345.

the Thirteenth and Fourteenth Amendments, the construction which this Court has placed on the meaning of personhood within those amendments has kept the two-tiered analysis of *Dred Scott* alive. It is time to bury the dead, this time with a stake driven through its heart.

The parallel between *Dred Scott* and *Roe v. Wade* was drawn by Jesse Jackson, who once said (before his political aspirations took hold, and when he still cared first about protecting his people),

> "There are those who argue that the right to privacy is of higher order than the right to life. I do not share that view. I believe that life is not private, but rather it is public and universal. If one accepts the position that life is private, and therefore you have the right to do with it as you please, one must also accept the conclusion of that logic. That was the premise of slavery. You could not protest the existence of treatment of slaves on the plantation because that was private and therefore outside of your right to be concerned.
>
> "Another area that concerns me greatly, namely because I know how it has been used with regard to race, is the psycholinguistics involved in this whole issue of abortion. If something can be dehumanized through the rhetoric used to describe it, then the major battle has been won. ***** That is why the Constitution called us three-fifths human and then whites further dehuman ized us by calling us "niggers." It was part of the dehumanizing process. The first step was to distort the image of us as human beings in order to justify that which they wanted to do and not even feel like they had done anything wrong. Those advocates of taking life prior to birth do not call it killing or murder, they call it abortion. They further never talk about aborting a baby because that would imply something human. Rather they talk about aborting the fetus. Fetus sounds less than human and therefore can be justified." Jackson, Rev. Jesse, *National Right To Life News*, January, 1977, at 5.

Under the Constitution we were always considered at least three-fifths of a person. And for the greater part of a century following the Civil War we were always entitled (at least on paper) to separate but equal treatment. But what about our prenatal offspring? Under *Roe* those among us who have not been born yet are not persons at all. The treatment which our prenatal offspring receive is neither separate nor equal, even on paper; the only treatment which our prenatal offspring receive in the eyes of the law is the callous and willingly blind decision to let the abortionists take them and do with them what they will. Pontius Pilate would be proud of us. Not to mention Margaret Sanger.

This concept of the disposable human being reaches its greatest height when it comes to dealing with America's socially despised poor. As Mr. Jackson also said,

> "Politicians argue for abortion largely because they do not want to spend the necessary money to feed, clothe and educate more people. Here arguments for inconvenience and economic savings take precedence over arguments for human value and human life. I read recently where a politician from New York was justifying abortion because they had prevented 10,000 welfare babies from being born and saved the state $15 million. In my mind serious moral questions arise when politicians are willing to pay welfare mothers between $300 to $1,000 to have an abortion, but will not pay $30 for a hot school lunch program to the already born children of these same mothers." *Id.*

As members of the culture which was the immediate

victim of the *Dred Scott* decision, we sympathize with our fellow human beings who are now similarly victimized by the same analysis under this Court's decision in *Roe v. Wade*. We ask this Court to recognize its mistake and overrule *Roe v. Wade*.

We would like to ask this Court if it is aware of what it means to be told from childhood that prior to the Civil War, your own people were not part of America's heritage? The sons and daughters of white society can look upon George Washington, Paul Revere, and Thomas Jefferson as being part of their heritage. Even the children of recent white immigrants can feel this way. But not black children. They are told that prior to the Civil War, their people were absolutely nothing at all in the view of society. All of those great things of the past—the signing of the Declaration of Independence, the enactment of the Bill of Rights, the emergence of our country as a great nation in the early 1800's—these are all the heritage of those who are white, but not us.

The terrible lie of *Dred Scott* must be exposed. Its impact on us even today is devastating. To this day it tells black boys and girls that in certain ways they do not really belong here, that they are not a full part of society, that they do not share in the full, rich heritage of our nation.

The people must be told that *Dred Scott* was wrong on day one. They must be told that it was a misstatement of the law at that time even according to law of the slave states themselves—that the law in this society even before then had recognized us as being persons just as much as anyone else is, even if the law was incapable of recognizing our right to enjoy our civil liberties just as much as anyone else could.

Similarly, *Roe v. Wade* continues to have even more and more devastating effects as time goes on. As a result of the

erroneous finding of the nonpersonhood status of prenatal human offspring, this Court has now had to sit silently by and watch helplessly as the courts have struck down the protection for prenatal humans against being experimented on or harvested and sold for body parts. *Lifchez v. Hartigan*, 735 F.Supp. 1361 (N.D. Ill. 1990); *affd.* 914 F.2d 260 (1990); *cert. den. sub. nom. Scholberg v. Lifchez*, ___ U.S. ___ (January 22, 1991). And it has been compelled by its reading of federal statutes to conclude that the law prohibits people from trying to protect prenatal offspring from being born with brain damage caused by lead poisoning. *Automobile Workers v. Johnson Controls*, 51 C.C.H. S.Ct.Bull. B1159 (March 20, 1991).

We all know who will be the greatest victims of this. Poor women will be more inclined than rich women will to receive payments for having their offspring experimented on. Poor women will be more inclined to initiate pregnancies for profit so that their offsprings' organs and tissues can be harvested as spare parts for the children of the rich. Poor women will feel greater pressures to accept higher paying jobs which expose their children to possible birth defects.

And that means black women, doesn't it?

The bottom line is that poor people will be paying in blood for the economic and personal advantages of the rich. This lends new meaning to the Bill of Rights: You get the Rights, and we get the Bill.

CONCLUSION

We ask this Court to keep undiluted the race-based test for protection within the meaning of those federal civil rights laws which Congress specifically enacted to protect racial minorities. We ask that this Court not let itself be fooled by those who would let the Ku Klux Klan law be turned inside out and used by those who will do all they can to rid society of its poor, despised, black population through the socially sanitized tool of abortion.

We submit that there is no fundamental right here guaranteed by the United States Constitution, and that thus there is no valid claim under federal law. Thus, the federal courts lack subject matter jurisdiction to hear this case. We ask this Court to overrule *Roe v. Wade* and the analysis of the *Dred Scott* decision (which, unlike the result of the *Dred Scott* decision, remains very much alive today.)

Respectfully submitted,
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